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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

NEXTDOOR.COM, INC., a Delaware
 corporation,

Plaintiff,

vs.

RAJ ABHYANKER, an individual,

Defendant.

CASE NO. 3:12-cv-05667-EMC

**BENCHMARK CAPITAL PARTNERS, L.P.'S
 AND BENCHMARK CAPITAL
 MANAGEMENT CO. LLC'S NOTICE OF
 MOTION AND MOTION TO DISMISS
 SECOND AMENDED COUNTERCLAIM;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT THEREOF**

RAJ ABHYANKER, an individual,

Counterclaimant,

vs.

NEXTDOOR.COM, INC., a Delaware
 corporation; PRAKASH
 JANAKIRAMAN, an individual;
 BENCHMARK CAPITAL PARTNERS,
 L.P.,
 a Delaware limited partnership;

Date: February 13, 2014
 Time: 1:30 P.M.
 Judge: Honorable Edward M. Chen

1 BENCHMARK CAPITAL
2 MANAGEMENT CO. LLC,
3 a Delaware limited liability company;
4 SANDEEP SOOD, an individual;
5 MONSOON COMPANY, an unknown
6 business entity, and DOES 1-50, inclusive,
7
8 Counterdefendants.
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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on February 13, 2014 at 1:30 P.M., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Edward M. Chen, 450 Golden Gate Avenue, San Francisco, California, Counterdefendants Benchmark Capital Partners, L.P. and Benchmark Capital Management Co. LLC (collectively, “Benchmark”) will and hereby do move for an Order dismissing Defendant and Counterclaimant Raj Abhyanker’s (“Abhyanker”) counterclaim for misappropriation of trade secrets against Benchmark.

This Motion is made pursuant to the Federal Rule of Civil Procedure 12(b)(6) on the ground that Abhyanker has failed to state a claim against Benchmark upon which relief can be granted. This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, Benchmark’s Request for Judicial Notice, the Declaration of Matthew Rawlinson and the exhibits attached thereto, the pleadings and other papers on file in this action, and any other oral or written submissions the Court may entertain.

STATEMENT OF THE ISSUES

1. Has Counterclaimant Raj Abhyanker failed to state that Benchmark has disclosed or otherwise misappropriated his alleged trade secrets, such that the Counterclaim against Benchmark should be dismissed?
2. Has Counterclaimant Raj Abhyanker failed to state that he communicated any actionable trade secrets to Benchmark, such that the Counterclaim against Benchmark should be dismissed?
3. Has Counterclaimant Raj Abhyanker failed to state a plausible claim for trade secret misappropriation under *Twombly* and *Iqbal*, such that the Counterclaim against Benchmark should be dismissed?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Nexdoor.com, a social networking site, sued Raj Abhyanker (“Abhyanker”) to quiet title on a trademark. In response to that trademark claim, Defendant Abhyanker, who is now on the third version of his proposed Second Amended Answer and Counterclaim (SAAC),¹ countersued Benchmark Capital Partners, L.P. and Benchmark Capital Management Co. LLC (collectively, “Benchmark”) — a leading venture capital firm headquartered in Menlo Park, California, accusing Benchmark of misappropriating trade secrets related to certain neighborhood-based social networking concepts. This counterclaim against Benchmark should be dismissed with prejudice for multiple reasons.

First, the misappropriation claim fails because, even if taken as true, the allegations in the SAAC do not establish that Benchmark violated any cognizable nondisclosure duty. Abhyanker originally counterclaimed against Benchmark for breach of an alleged oral contract. However, as Benchmark pointed out at the time the original complaint was filed, Abhyanker’s claim was barred by the statute of frauds. Abhyanker subsequently abandoned his contract claim and now attempts to recast that claim as one for misappropriation of trade secrets. The alleged factual basis, however, has not changed: the claim relies entirely on a vague, alleged oral promise to keep secret “any and all” material from Abhyanker, SAAC ¶ 120, even though most of what Abhyanker allegedly provided was indisputably public information. As a result, Abhyanker’s trade secret claim fails for the same reason his contract claim did. This alleged oral contract does not provide a cognizable basis to impose a duty on Benchmark, nor does it demonstrate that Abhyanker took reasonable steps to protect the specific trade secrets at issue here.

Second, Abhyanker has failed to plead that he disclosed any actionable trade secrets to Benchmark. After repeated efforts to force Abhyanker to identify with specificity the trade secrets he claims were misappropriated, he has narrowed the alleged trade secrets to only two

¹ As the Court noted, Abhyanker submitted three different versions of his proposed second amended answer and counterclaims, (Dkt. Nos. 115, 121, 132), in conjunction with his motion for leave to amend. (12/12/13 Order [Dkt. No. 136], at 2.) The Court deemed filed the most recent version, dated December 5, 2013, (Dkt. No. 132, Exh. A), which is the operative SAAC.

1 items: (i) the “bidding history” (whatever that means) of the nextdoor.com domain name and (ii)
 2 the “identification of the Lorelei neighborhood in Menlo Park, California as the ideal first
 3 neighborhood to use to test and launch a neighborhood social network.” (Third Am. Designation
 4 of Trade Secrets [Dkt. No. 135], at 2.) Not only does Abhyanker fail to allege facts that would
 5 establish (even if true) that either of these is a trade secret with independent economic value,
 6 both are publicly available information.

7 *Third*, even putting aside these deficiencies, Abhyanker fails to allege a plausible claim
 8 under the standard articulated by the Supreme Court in *Twombly* and *Iqbal*. Abhyanker admits
 9 that the basis for his claim is nothing more than the coincidence that a company funded by
 10 Benchmark is allegedly similar in some respects to “his idea” of a neighborhood-based social
 11 networking site. As the Court has already held, however, the “concept” of a neighborhood-based
 12 social network was already publicly available at the relevant time and is not a trade secret.
 13 (7/19/13 Order [Dkt. No. 100], at 12.) The coincidence that someone else used this publicly
 14 available idea to start a company is thus not a plausible basis to allege disclosure by Benchmark
 15 of the specific trade secrets at issue here. Indeed, as to Benchmark, the only factual allegation in
 16 support of the specific trade secrets now asserted (the “bidding history” and the Lorelei
 17 neighborhood) is that the founders of Nextdoor.com “had access” to the information while at
 18 Benchmark, and even that is pled on “information and belief.” SAAC ¶ 144. However, it is
 19 well-settled that access alone is not a plausible basis for a trade secret misappropriation claim.
 20 *See Pellerin v. Honeywell Int’l, Inc.*, 877 F. Supp. 2d 983, 989 (S.D. Cal. 2012); *Nexsales Corp.*
 21 *v. Salebuild, Inc.*, No. C-11-3915, 2012 WL 216260, at *1–*2 (N.D. Cal. Jan. 24, 2012) (Chen,
 22 J.)

23 Moreover, Abhyanker’s claim is implausible in a variety other respects. Abhyanker
 24 never alleges any colorable motive for Benchmark to steal his trade secrets, and to sit on them
 25 for several years, rather than simply investing in his company (Abhyanker’s initial explanation in
 26 his state court lawsuit was that Benchmark was biased against Arizonans, towards “hunters” and
 27 against fathers with children, or just had a “culture of communism”). Abhyanker’s current
 28 allegations also contradict his original claims in key respects. For instance, in his state court

lawsuit, he admitted that he was pitching Benchmark to invest in Fatdoor, and that Fatdoor (not Abhyanker) owned the intellectual property at issue — a fact that was fatal to his personal claim. He now asserts that he communicated trade secrets that he personally owned (the LegalForce/Nextdoor trade secrets). SAAC ¶¶ 99–100. He claims these secrets are entirely “separate and distinct,” *id.* ¶ 127, from Fatdoor — the company he was pitching to Benchmark, and that these secrets were relevant to enhancing the “security and privacy” of the “new version of Fatdoor.com,” *id.* ¶ 119. Yet, neither of the two alleged trade secrets contained in Abhyanker’s subsequent trade secret disclosure (the bidding history and the Lorelei neighborhood) has any alleged or apparent connection with security or privacy.

In short, taken together, Abhyanker’s trade secret claim — based entirely on the allegation that Nextdoor.com’s founders must have had “access” to this information while at Benchmark — simply fails to cohere or make “common sense” to state a plausible theory of liability or damages. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

II. FACTUAL & PROCEDURAL BACKGROUND

A. Abhyanker’s Prior State Court Action

On November 10, 2011, Abhyanker sued Benchmark and several individuals associated with Benchmark (among others) in Santa Clara Superior Court, Case No. 11-cv-212924. Shortly thereafter — and prior to any defendant responding to the complaint — on December 6, 2011, Abhyanker filed a First Amended Complaint (“State Compl.”). (Declaration of Matt Rawlinson in Support of Benchmark’s Motion to Dismiss [“Rawlinson Decl.”], Exh. 1.) According to that complaint, Abhyanker was “a founder and former CEO of Fatdoor, Inc.” State Compl. ¶ 20. The complaint made clear that “Fatdoor” was a “neighborhood social networking” website:

- “Plaintiff is the lead inventor on forty six (46) United States patent applications and six (6) international PCT patent applications filed by Fatdoor, Inc. relating to the Nextdoor/Fatdoor concept and covering a wide variety of geo-spatial database, architecture, and application technologies *associated with neighborhood communication and geo-spatial social networking.*” *Id.* ¶ 20 (emphasis added).
- “Defendants actively interfered with the operations of Fatdoor, Inc. with respect to the Nextdoor/Fatdoor concept causing the company to abandon its plans to

pursue the domain Nextdoor.com, the *Nextdoor/Fatdoor business model for neighborhood social working . . .*” *Id.* ¶ 21 (emphasis added).

- “Absent Defendants’ fraudulent scheme to interfere with the business operations of Fatdoor, Inc. . . . [the company] would not have abandoned the pursuit of its original and novel *Nextdoor/Fatdoor neighborhood social networking concept* that Plaintiff invented and developed.” *Id.* ¶ 24 (emphasis added).
- “Defendant Benchmark began an ill-conceived scheme to unfold and destroy Plaintiff and *Fatdoor, Inc.’s focus around neighborhood social networking*[.]” *Id.* ¶ 94 (emphasis added).

These and other allegations also made clear that Fatdoor and “Nextdoor” were one and the same. *See supra* (repeatedly referencing the singular “Nextdoor/Fatdoor” concept); *see also id.* ¶ 35 (“Since the name ‘Nextdoor.com’ was expensive to buy, Fatdoor, Inc. used the name ‘Fatdoor.com’ as a second preference until additional funding could be raised after the summer of 2007 to purchase the Nextdoor.com domain. . . . It was Plaintiff and Fatdoor, Inc.’s intention to purchase the name Nextdoor.com, and change the name of its business accordingly from Fatdoor, Inc. to Nextdoor, Inc.”).

In June 2007, Fatdoor sought venture capital financing. *Id.* ¶¶ 56–57. As part of this effort, Abhyanker alleged that he and other Fatdoor representatives met with Benchmark to seek funding for Fatdoor. *Id.* ¶¶ 56, 77, 80–81. In doing so, Abhyanker alleges that Fatdoor provided Benchmark a “diligence package” that allegedly included various “patent applications” and “secret technical details, software algorithms, [and] knowhow.” *Id.* ¶¶ 50, 84. Benchmark decided not to invest in Fatdoor. Fatdoor, however, received significant funding from other investors. *Id.* ¶ 94. Nevertheless, a few weeks later, following the completion of the fundraising process, Fatdoor fired Abhyanker. *Id.* ¶ 101. Fatdoor was later sold, and according to Abhyanker, “Google, Inc. now owns the rights to the original technology of the Nextdoor/Fatdoor concept.” *Id.* ¶ 169.

More than four years after Abhyanker met with Benchmark, “[a] press release was issued” announcing “a new website called ‘Nextdoor.com.’” *Id.* ¶ 130. Nextdoor.com was founded by a group including Counterdefendant Prakash Janakiraman (“Janakiraman”) and received financing from Benchmark. *Id.* ¶¶ 13–15, 130–31. Abhyanker alleged in conclusory

terms that Nextdoor.com was the end result of Benchmark's "scheme" to destroy Fatdoor. *Id.* ¶ 24.

In January 2012, Benchmark (along with the other defendants) demurred to the State Complaint. (Rawlinson Decl., Exh. 2 [Demurrer].) Benchmark pointed out that, among other deficiencies, the State Complaint made clear that Abhyanker was merely Fatdoor's agent when he pitched Benchmark, and that Google (not Abhyanker) now owns Fatdoor's former intellectual property. *Id.* Abhyanker never opposed Benchmark's Demurrer. Instead, shortly thereafter, in February 2012, Abhyanker voluntarily dismissed the complaint. (Rawlinson Decl., Exh. 3 [Dismissal].)

B. Nextdoor.com's Lawsuit And Abhyanker's Counterclaims

Though he dismissed his state court action, Abhyanker soon renewed his efforts to harass Nextdoor.com. *See generally* Dkt. No. 1. Among other things, Abhyanker opposed Nextdoor.com's efforts to register the "NEXTDOOR" trademark and launched a website called www.nextdoor.cm. *Id.* ¶¶ 29–40, 49–53. In response, Nextdoor.com eventually initiated the instant action against Abhyanker in November 2012. Most basically, Nextdoor.com "seeks a declaration that it is the senior user and owner of the NEXTDOOR Mark in its field . . . [and] also seeks to end Abhyanker's recent acts of infringement and cyberpiracy. . . ." *Id.* ¶ 5. Benchmark is not mentioned in this Complaint.

In January 2013, Abhyanker answered Nextdoor.com's Complaint and asserted various counterclaims against both Nextdoor.com and several nonparties to the original action. In response to motions to dismiss by Benchmark and the other Counterdefendants, Abhyanker filed yet another amendment to his claims. (*See* First Amended Answer and Counterclaims ["FAAC"], Dkt. No. 59.) In the FAAC, Abhyanker asserted a single counterclaim for misappropriation of trade secrets against Benchmark and the other Counterdefendants.

Although Benchmark was not served until September 24, 2013, Counterdefendants Nextdoor.com and Sandeep Sood moved to dismiss the claims, partly on the ground that

Abhyanker had not identified any specific trade secrets that had been stolen.² On July 19, 2013, the Court ruled that there could be no trade secret misappropriation as to the “use of the name nextdoor.com” because this “concept” was already disclosed in a patent application before the alleged acts of misappropriation took place. (Dkt. No. 100, at 12.) The Court otherwise allowed the claims to proceed, with the caveat that Abhyanker was to disclose with specificity the trade secrets that had been allegedly misappropriated by August 2, 2013. (*Id.* at 9–10, 25–26.)

C. Abhyanker’s Identification Of His Alleged Trade Secrets

On September 26, 2013, more than 8 months after the original counterclaim was filed and more than a month after the Court’s deadline, Abhyanker filed an “amended” disclosure that, for the first time, identified the purported trade secrets that Benchmark allegedly misappropriated. (Dkt. No. 116.) In less than one page of text, Abhyanker purports to identify three alleged trade secrets: (1) “the bidding history of the Nextdoor.com domain,” (2) “identification of the Lorelei neighborhood as the first neighborhood to launch Nextdoor in,” and (3) “the source code for the user interface of his online private social network.” (*Id.* at 2.) Subsequently, Abhyanker dropped the source code claim, limiting his identification of trade secrets to only “the bidding history of the Nextdoor.com domain and the identification of the Lorelei neighborhood in Menlo Park, California as the ideal first neighborhood to use to test and launch a neighborhood social network.” (Dkt. No. 135, at 2.)

D. Allegations Against Benchmark In The SAAC

Abhyanker’s current counterclaim against Benchmark contradicts his original state complaint in many respects. Abhyanker now recasts Fatdoor as a “public Wikipedia-like neighborhood commenting tool.” *Id.* ¶ 117. He claims that this Fatdoor concept was entirely “separate and distinct” from his “Legalforce/Nextdoor concept,” SAAC ¶ 127, which now embodies the neighborhood-based social networking idea he previously called Fatdoor in this

² Two days after service, Abhyanker filed a motion for leave to further amend his counterclaims. (Dkt. No. 115). In light of that motion, counsel for Benchmark and Abhyanker agreed via email to extend Benchmark’s answer deadline until 21 days after the Court ruled on his motion for leave. At the Case Management Conference on December 12, 2013, the parties and the Court agreed that Benchmark’s motion to dismiss would be filed by January 9, 2014. (Dkt. No. 137.)

1 state court complaint.³ Abhyanker claims that despite pitching Fatdoor — an entirely “separate
 2 and distinct” idea from LegalForce/Nextdoor, he nevertheless made “a detailed disclosure” of his
 3 own “LegalForce and Nextdoor Trade Secrets” to Benchmark, *id.* ¶ 121. He gives no
 4 explanation for why he would be doing so, other than that these alleged trade secrets were
 5 relevant to enhancing the “security and privacy” of a “new version of Fatdoor.com, which was to
 6 incorporate LegalForce and Nextdoor Trade Secrets.” *Id.* ¶¶ 119, 120.

7 Abhyanker alleges that in 2010 — three years after he purportedly disclosed unspecified
 8 trade secrets to Benchmark and after he was fired as CEO of Fatdoor — he returned to working
 9 on the Nextdoor concept and “placed numerous bids in an effort to try to secure the
 10 Nextdoor.com domain,” but was “unsuccessful in bidding given that Sood, upon reason and
 11 belief, had disclosed [his] bidding to Nextdoor.com.” *Id.* ¶ 132. In October 2010, he alleges that
 12 Nextdoor.com prototyped its website in the Lorelei neighborhood under the temporary name
 13 “Neighborly,” and then publicly launched the nextdoor.com website a year later. *Id.* ¶¶ 145–50.

14 Notably missing from Abhyanker’s counterclaim, however, are any facts related to
 15 Benchmark’s disclosure or use of his alleged trade secrets. Rather, the basis for Abhyanker’s
 16 claim against Benchmark appears to be nothing more than that four years after he pitched some
 17 sort of concept to Benchmark that involved local social networks (a public concept), two people
 18 who were allegedly entrepreneurs in residence at Benchmark at the time started a local social
 19 network, and used as their name one of the several names Abhyanker had considered for his long
 20 abandoned project. Like the concept of a neighborhood-based social network, the idea of using
 21 this name for such a network was also an idea in the public domain. Based on nothing more than
 22 the coincidence that Nexdoor.com used these two public domain ideas, Abhyanker asserts one
 23 cause of action against Benchmark for trade secret misappropriation. *Id.* ¶¶ 187–94.⁴ The
 24 _____

25 ³ But as described above, Abhyanker was clear that “Fatdoor, Inc.’s focus [was] around
 26 neighborhood social networking.” State Compl. ¶ 94. Indeed, the fact that Fatdoor was a
 “neighborhood social networking” site was the basis for his state claim. *See, e.g., id.* ¶ 21.

27 ⁴ Indeed, although Abhyanker has now been forced to identify the “trade secrets” he claims
 28 were taken, it is clear from his counterclaim that the real issue is that he believes Nextdoor.com
 stole his “idea” or “concept.” *See, e.g., SAAC* ¶ 97 (asserting he “pitched his ideas to
 Benchmark”); ¶ 126 (alleging he tried to acquire the Nextdoor.com domain around his “idea for

SAAC fails to state a plausible claim for relief and should be dismissed with prejudice.

ARGUMENT

III. STANDARD OF REVIEW

Dismissal under Rule 12(b)(6) is proper where the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679; *accord Wistron Corp. v. Phillip M. Adams & Assocs., LLC*, No. C-10-4458, 2011 WL 1654466, at *10 (N.D. Cal. Apr. 28, 2011) (Chen, J.). “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Iqbal*, 556 U.S. at 678 (citation and quotes omitted); *accord Lacey v. Maricopa Cnty.*, 693 F.3d 896, 911 (9th Cir. 2012) (en banc); *Wistron Corp.*, 2011 WL 1654466, at *11. Nor is it enough that the complaint is “factually neutral”; rather, it must be “factually suggestive.” *Twombly*, 550 U.S. at 557 n.5.

The district court need not grant leave to amend if amendment of the complaint would be futile. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051–52 (9th Cir. 2008). Dismissal without leave to amend is proper where the curative allegations would be inconsistent or contrary to the prior pleading. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296–97 (9th Cir. 1990); *accord Wehlage v. EmpRes Healthcare, Inc.*, 791 F. Supp. 2d 774, 781 (N.D. Cal. 2011).

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a private neighborhood social network”); ¶¶ 99–113 (repeatedly referencing his “LegalForce and Nextdoor concepts,” the “LegalForce/Nextdoor concepts,” the “Nextdoor concept,” or “original Nextdoor concept”). But as the Court held, this is nonsense. The “concept” upon which he is fixated was clearly in the public domain and was not “his.” (Dkt. No. 100, at 12.)

1 **IV. ABHYANKER FAILS TO STATE A CLAIM AGAINST BENCHMARK FOR**
 2 **TRADE SECRET MISAPPROPRIATION**

3 **A. The Lack Of An Enforceable Contract Is Fatal To Abhyanker's Trade Secret**
 4 **Misappropriation Counterclaim Against Benchmark**

5 To state a claim against Benchmark for trade secret misappropriation under the California
 6 Uniform Trade Secret Act ("CUTSA"), Cal. Civ. Code §§ 3426–3426.11, Abhyanker must
 7 allege that: (1) he owned a trade secret; (2) Benchmark "acquired, disclosed, or used the trade
 8 secret through improper means;" and (3) Benchmark's actions damaged him. *Nexsales*, 2012
 9 WL 216260, at *2. The CUTSA defines "misappropriation" as either (1) improper acquisition of
 10 a trade secret or (2) improper disclosure or use of a trade secret. Cal. Civ. Code § 3426.1(b). "A
 11 trade secret is misappropriated if a person . . . discloses or uses a trade secret the person has
 12 acquired by 'improper means' or in violation of a nondisclosure obligation" *Ajaxo Inc. v.*
 13 *E*Trade Group Inc.*, 37 Cal. Rptr. 3d 221, 255 (2005). "[W]here an UTSA plaintiff seeks to
 14 show misappropriation by 'breach or inducement of a breach of duty to maintain secrecy,' that
 15 party must demonstrate that the defendant (1) had a duty to maintain secrecy, and (2) breached
 16 that duty." *Be In, Inc. v. Google Inc.*, No. 12-cv-03373, 2013 WL 5568706, at *3 (N.D. Cal.
 17 Oct. 9, 2013) (quoting Cal. Civ. Code § 3426.1(a)).

18 Here, Abhyanker does not allege any facts that Benchmark wrongfully *acquired* or *used*
 19 his trade secrets. Rather, the gravamen of Abhyanker's misappropriation claim is that
 20 Benchmark *disclosed* his trade secrets in violation of an oral confidentiality agreement. *See* Cal.
 21 Civ. Code § 3426.1(b)(2)(B)(ii). Abhyanker alleges he received oral assurances that Benchmark
 22 would keep confidential "any and all information disclosed by Abhyanker during any future
 23 meetings." *See* SAAC ¶ 120. Abhyanker claims that in violation of this "oral confidentiality
 24 agreement," *id.* ¶ 107, Benchmark "disclosed Abhyanker's Trade Secrets to both Janakiraman
 25 and Toila, who then proceeded to misappropriate and use [his] Trade Secrets as a foundation of
 26 Nextdoor.com." *Id.* ¶ 135.⁵

27 This alleged oral contract is the entire basis of Benchmark's purported duty. However, as

28 ⁵ As described below, Abhyanker does not allege any nonconclusory facts regarding such
 disclosure of the trade secrets to Janakiraman and Toila — *i.e.*, when Benchmark made such
 disclosures, by whom, and in what context.

1 Benchmark pointed out at the time the original counterclaim was filed, this alleged nondisclosure
 2 obligation between Abhyanker and Benchmark is clearly invalid under the statute of frauds.
 3 (Mem. in Supp. Motion to Dismiss [Dkt. No. 40], at 9–13.) “An agreement that by its terms is
 4 not to be performed within a year from the making thereof” is “invalid, unless [it], or some note
 5 or memorandum thereof, [is] in writing.” Cal. Civ. Code § 1624(a)(1); *see also Sterling v.*
 6 *Taylor*, 40 Cal. 4th 757, 766 (2007) (“A memorandum satisfies the statute of frauds if it
 7 identifies the subject of the parties’ agreement, shows that they made a contract, and states the
 8 essential contract terms with reasonable certainty.”). Abhyanker does not allege that there is any
 9 such document in writing. And there is no possibility in either law or fact that the
 10 “confidentiality agreement” alleged by Abhyanker was intended to last for only one year; it was
 11 to extend for perpetuity. Indeed, Abhyanker does not even allege it was breached within a year.
 12 Accordingly, under California law, this is not a valid oral contract. *See Tostevin v. Douglas*, 160
 13 Cal. App. 2d 321, 327–28 (1958) (“[A] contract is invalid under the statute of frauds when it is
 14 evident from the subject matter of the contract that the parties had in contemplation a longer
 15 period than one year as the time for its performance.” (citation and quotes omitted)).

16 The absence of a cognizable contract under these circumstances also bars Abhyanker’s
 17 trade secret claims. The primary purpose of the statute of frauds “is to bar fraud-induced
 18 enforcement of contracts never actually made by requiring reliable evidence of the existence and
 19 terms of the contract. The statute of frauds is meant to prevent courts from enforcing an alleged
 20 oral contract that never actually was entered into. . . .” *Siam Numhong Prods. Co., Ltd. v.*
 21 *Eastimpex*, 866 F. Supp. 445, 450 (N.D. Cal. 1994). Indeed, trade secret cases have applied the
 22 same principle, holding that a party must take reasonable steps to protect the secrecy of his
 23 information, and this includes securing written confidentiality agreements, and clearly
 24 distinguishing between confidential and non-confidential material. *See MAI Sys. Corp. v. Peak*
 25 *Computer, Inc.*, 991 F.2d 511, 521 (9th Cir. 1993); *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d
 26 277, 286–87 (2002); *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 923 F. Supp.
 27 1231, 1253–54 (N.D. Cal. 1995); *see also* Cal. Civ. Code § 3426.1(d)(2) (defining a trade secret
 28 as information that “[i]s the subject of efforts that are reasonable under the circumstances to

1 maintain its secrecy”).

2 Abhyanker’s “oral contract” is precisely the type of vague, unsubstantiated claim of an
3 unspecific agreement that the statute of frauds was designed to prohibit, *see, e.g., Sterling*, 40
4 Cal. 4th at 766, and that demonstrates he did not take “reasonable steps” to keep the secrets at
5 issue here confidential, *see MAI Sys. Corp.*, 991 F.2d at 521. Although Abhyanker is an attorney
6 by training, and notwithstanding that he was apparently providing to Benchmark confidential
7 information for two entirely “separate and distinct” entities, SAAC ¶ 127, he made no effort to
8 document the exchange. He also fails to allege any of the specific facts about the contract (what
9 was agreed to, by whom, and the conditions of the oral contract between himself and
10 Benchmark); rather, he just vaguely claims that Benchmark agreed to keep “any and all
11 information” secret. SAAC ¶ 120. Moreover, although much of the material communicated was
12 indisputably public information, Abhyanker does not allege that any distinction was made
13 between the mass of public information and the information he now claims was a trade secret.
14 Nor does he allege that he informed anyone at Benchmark that he considered the two pieces of
15 information — which he now alleges were trade secrets — to be “confidential” or covered by the
16 alleged promise, even though neither is obviously confidential or a trade secret, and neither was
17 designated as such. This simply does not reflect sufficient efforts by Abhyanker to maintain the
18 confidentiality of the information he now claims was a trade secret.

19 Not only is the alleged “promise” implausible on its face, Abhyanker’s allegations
20 regarding the circumstances surrounding the alleged June 2007 oral confidentiality agreement
21 have repeatedly shifted. In his initial counterclaims (“CC”), for example, he alleged that in two
22 different phone calls, Benchmark’s general partner Kevin Harvey separately gave oral assurances
23 of confidentiality to Abhyanker and Fatdoor investor Jeffrey Drazan. CC ¶ 119. As Benchmark
24 pointed out, however, the purported oral contract between Drazan and Fatdoor undercut
25 Abhyanker’s assertion that he entered into an oral contract in his individual capacity. (Mem. in
26 Supp. Motion to Dismiss [Dkt. No. 40], at 11 n.2.) Abhyanker subsequently changed his story
27 once again — now alleging that there was only one phone call between himself and Harvey. *See*
28

1 SAAC ¶ 120.⁶

2 In sum, Abhyanker cannot show that Benchmark violated a cognizable nondisclosure
3 agreement, *Ajaxo Inc.*, 37 Cal. Rptr. 3d at 255; that he had a duty to maintain secrecy, *Be In*,
4 2013 WL 5568706, at *3; or that he took reasonable steps to protect the trade secrets at issue,
5 *MAI Sys. Corp.*, 991 F.2d at 521.

6 **B. Abhyanker Fails To Plead That He Communicated Any Actionable Trade**
7 **Secrets To Benchmark**

8 As noted above, although the Court denied Counterdefendants' motion to dismiss in its
9 July 2013 Order, it simultaneously directed Abhyanker to identify the allegedly misappropriated
10 trade secrets with specificity. *See* Dkt. No. 100, at 9–10 (Abhyanker is “to provide additional
11 detail regarding the trade secrets he alleges Counter-Defendants misappropriated, and how each
12 secret was allegedly misappropriated by Counter-Defendants.”). The Court expressly held that
13 the Counterdefendants' motion to dismiss the alleged trade secret misappropriation was denied
14 “*without prejudice* to [their] ability to bring a motion to dismiss *if the disclosure process*
15 *identified by the parties reveals deficiencies in Plaintiff's claim.*” (*Id.* at 10 (emphasis added));
16 *see also Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210, 221 (2010) (“It is critical to any
17 CUTSA cause of action . . . that the information claimed to have been misappropriated be clearly
18 identified.”), *overruled on other grounds by Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310 (2011).

19 Some two months later, in September 2013, Abhyanker finally purported to disclose the
20 alleged trade secrets he claims were misappropriated with respect to Benchmark. (Dkt. No.
21 116.)⁷ Although deficient, even based on this disclosure, it is clear that Abhyanker's trade secret
22 claims against Benchmark are not viable. Indeed, despite references in the SAAC to
23 “algorithms,” “business plans,” “user interface designs,” “software code,” and the “name
24

25 ⁶ In similar fashion, Abhyanker's original counterclaim alleged that he had transferred
26 tangible trade secrets — computer code and a hard copy diligence file — items that could be
27 verified and tested against the public domain. Now, the only two trade secrets at issue are
28 alleged oral communications. But as discussed below, despite the Court's order to identify the
alleged trade secrets with great specificity, even the contours of these oral statements remain
vague and unspecific.

⁷ Abhyanker later amended this disclosure yet again on December 12, 2013. (Dkt. No. 135.)

Nextdoor,” among others, SAAC ¶ 100, none of these matters are now at issue. Rather, the only two alleged trade secrets identified by Abhyanker are the “bidding history” for the nextdoor.com domain name and the identification of the Lorelei neighborhood as a test neighborhood to prototype a social networking website. (Dkt. No. 135, at 2.) Neither of these alleged items constitute an actionable trade secret.

A trade secret is “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Cal. Civ. Code § 3426.1(d). “The test for the existence of trade secrets is ‘whether the matter sought to be protected is information (1) which is valuable because it is unknown to others and (2) which the owner has attempted to keep secret.’” *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d 1177, 1183–84 (C.D. Cal. 2006) (quoting *Whyte*, 125 Cal. Rptr. 2d at 286).

First, despite the Court’s order to disclose the alleged trade secrets in more detail, Abhyanker fails to even describe what the “bidding history” is that he claims is a trade secret.⁸ But on its face, the bidding process (along with background information on the status and registration of the domain name) is publicly accessible. The methods for submitting bids are transparent and readily accessible on numerous registration sites online.⁹ If the domain name is already in use, the search result will state that the domain is taken. *See* Rawlinson Decl. ¶ 5 & Exh. 4 [Search Result for Nextdoor.com]. Searches on the “WHOIS” record will also enable a browser to obtain information on every single domain currently registered in the world, including the registrant’s contact information, domain creation, expiration dates, and other data. *See*

⁸ For example, he does not define what the “bidding history” means (the number of bidding attempts, the fact that he personally placed the bid, or something else?); he does not describe the manner or method of the bid; and he otherwise provides no information that would permit a determination of whether it was secret and economically valuable.

⁹ Examples of such sites include networksolutions.com, godaddy.com, and tierra.net, among many others. The Internet Corporation for Assigned Names and Numbers (“ICANN”) coordinates domain names world-wide and maintains a list of accredited domain-name registrars. *See* <http://www.icann.org/registrar-reports/accredited-list.html>.

Rawlinson Decl. ¶ 6 & Exh. 5 [WHOIS Search Result for Nextdoor.com]. A prospective buyer may place bids using various methods — *e.g.*, placing a direct bid, using an agent, or a certified offer service. *See* Rawlinson Decl. ¶ 7 & Exh. 6 [Bidding Sites]. Thus, the bidding process, along with background information on the status and registration of the domain name, is publicly accessible and therefore not a trade secret. *See* Cal. Civ. Code § 3426.1(d)(1); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (“Information that is public knowledge or that is generally known in an industry cannot be a trade secret.”); *Religious Tech. Ctr.*, 923 F. Supp. at 1254 ([I]nformation that is generally known or readily ascertainable through proper means by others . . . is not protectable as a trade secret.” (citations and quotes omitted)). Further, making a bid does not bind the receiving party from any confidentiality agreement: the online user simply places a monetary offer or requests a price from the owner. The moment one makes such an offer, it is known to another person and thus no longer a secret. *See* Cal. Civ. Code § 3426.1(d)(1); *Ruckelshaus*, 467 U.S. at 1002 (“If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information . . . his property right is extinguished.”).

Furthermore, Abhyanker has not pled any facts sufficient to demonstrate (even if true) that the “bidding history” (whatever it is) has any independent economic value. *See Yield Dynamics, Inc. v. TEA Sys. Corp.*, 66 Cal. Rptr. 3d 1, 17–18 (2007) (explaining that to qualify as a trade secret the information must be “sufficiently valuable and secret to afford an actual or potential economic advantage over others,” not merely “helpful or useful to another person in carrying out a specific activity”) (citation and quotes omitted)). The Court has already ruled that the nextdoor.com domain name was publicly disclosed in this context, and therefore not a trade secret. *See* Dkt. No. 100, at 12 (“To the degree that Abhyanker’s counterclaim is based on the use of the nextdoor.com name in connection with a neighborhood-based social network . . . there is no trade secret subject to misappropriation, since this concept was disclosed in the ‘442 patent application prior to any of the alleged acts of misappropriation.”). Given that, absent any allegations in either the SAAC or Abhyanker’s trade secret disclosures supporting some economic value specific to the bidding here, there can be no serious argument that some

1 unspecific reference to the “bidding history” has any economic value beyond the value of the
2 idea of using the name itself.

3 Second, as with the bidding of domain names, the identification of the Lorelei
4 neighborhood in Menlo Park, California, as the place to prototype a neighborhood-based social
5 networking website cannot be a trade secret. As true of his identification of the “bidding
6 history,” Abhyanker fails to even identify what this alleged trade secret consists of, but instead,
7 merely references the fact that Nextdoor.com tested in that location in 2010. *See* SAAC ¶ 145.
8 Even putting aside Abhyanker’s failure once again to identify with any precision his alleged
9 trade secret, the characteristics of a single neighborhood — such as demographic makeup,
10 proximity to IT centers or resources, and other factors that might lead to use of any particular
11 location — are public information and not proprietary to Abhyanker. *See* Cal. Civ. Code §
12 3426.1(d)(1)); *Synopsys, Inc. v. ATopTech, Inc.*, No. C 13-cv-02965, 2013 WL 5770542 (N.D.
13 Cal. Oct. 24, 2013), *7 (observing that “material [that] is publicly accessible” is not covered by
14 trade secret protection).

15 Moreover, Abhyanker’s own allegations demonstrate that he had publicly disclosed the
16 location of the Lorelei neighborhood as a launch site for a neighborhood-based social network
17 before Nextdoor.com’s launch in 2010. Abhyanker specifically alleges that he “had already
18 **prototyped** his own Nextdoor and Fatdoor concepts in Lorelei,” before Nextdoor.com prototyped
19 its website in the Lorelei neighborhood in October 2010. SAAC ¶ 147; *see also id.* ¶ 119 (“The
20 prototype of Fatdoor.com was developed into a **working beta website**.”). The fact that Fatdoor
21 was already prototyped into a working (and thus public) website in the Lorelei neighborhood
22 destroys any claim that this concept was somehow a “trade secret” when Nextdoor.com
23 launched.¹⁰

24 Finally, Abhyanker’s claim that the Lorelei neighborhood was a trade secret
25 independently fails because he does not allege how knowledge of the Lorelei neighborhood as a
26

27 ¹⁰ The fact that the Fatdoor site was launched in the Lorelei neighborhood is also flatly
28 contradictory with the suggestion that this alleged “trade secret” was owned by Abhyanker
personally, rather than in his capacity as the CEO of Fatdoor and for Fatdoor’s benefit.

1 testing site provided “an actual or potential economic advantage over others.” *Yield Dynamics,*
 2 *Inc.*, 66 Cal. Rptr. 3d at 17 (quotes omitted).

3 **C. Abhyanker’s Trade Secret Allegations Do Not Meet The Standard Under**
 4 ***Twombly* and *Iqbal***

5 In addition to the foregoing deficiencies, Abhyanker’s allegations fail to meet the basic
 6 plausibility standard required by federal law. Abhyanker’s theory of Benchmark’s
 7 misappropriation is based on the coincidental fact that Janakiraman and Toila were entrepreneurs
 8 in residence at Benchmark in June 2007 and later launched a website similar to a public domain
 9 idea that had been pitched to Benchmark during that time. But as the Supreme Court made clear,
 10 simple coincidence or parallelisms, without more, are insufficient to show misconduct.
 11 *Twombly*, 550 U.S. at 556–57. This is particularly true here, given that the “coincidence”
 12 involves purely public domain material (neighborhood social network; nextdoor.com domain
 13 name for a neighborhood social network); hence, nothing about the alleged coincidence even
 14 suggests wrongful conduct. Moreover, in the SAAC, Abhyanker does not allege who at
 15 Benchmark disclosed the purported trade secrets to Janakiraman and Toila; he does not allege
 16 when the purported disclosure to Janakiraman and Toila occurred; and he does not allege which
 17 of the various purported trade secrets Benchmark allegedly disclosed. Abhyanker thus does not
 18 allege any tortious misconduct by Benchmark that is required for a misappropriation claim. *See*
 19 *PMC, Inc. v. Kadisha*, 93 Cal. Rptr. 2d 663, 673 (2000) (“Misappropriation of trade secrets is an
 20 intentional tort.”) (citing Cal. Civ. Code § 3426.1)).¹¹

21
 22 ¹¹ In fact, this coincidence may be of no consequence at all since Abhyanker admits that there
 23 are other sources who had nothing to do with Benchmark from whom Janakiraman and Toila
 24 could have received the purported trade secrets. For example, Benchmark now accuses Sandeep
 25 Sood — who is not alleged to have any relationship with Benchmark at all — of the same
 26 misconduct. *See* SAAC ¶ 143 (“Janakiraman and Nextdoor.com encouraged Sood to improperly
 27 disclose Abhyanker’s trade secret information and proceeded to use the information as the
 28 foundation of their business.”); *see also id.* ¶¶ 139–44 (allegations regarding Sood’s
 communications of his trade secrets); Second Am. Designation, at 2–3 (same). Thus,
 Abhyanker’s allegation that Benchmark provided the purported trade secrets to Nextdoor.com is
 admittedly one guess among others. This is precisely the sort of speculative claim that should
 not survive a motion to dismiss. *See Twombly*, 550 U.S. at 555.

1 In addition, Abhyanker’s allegations with respect to the two specific trade secrets at issue
 2 fail to do anything more than allege “access,” and even that is alleged only on information and
 3 belief. *See* SAAC ¶ 144 (“On information and belief, as Entrepreneurs in Residence at
 4 Benchmark, Janakiraman and Toila had access to confidential pitches that were delivered to
 5 Benchmark.”); *id.* ¶ 182 (“Toila had access to Abhyanker’s confidential material . . .”); *see also*
 6 First Am. Designation, at 5 (making similar allegations of how Janakiraman Toila had “full
 7 access” to Benchmark’s materials); Second Am. Designation, at 4–5 (same).

8 It is well settled, however, that mere allegations of “access” (much less allegations of
 9 access based merely on “information and belief”) are not sufficient to state a claim for trade
 10 secret misappropriation. *See Nexsales*, 2012 WL 216260, at *2 (dismissing trade secret claim
 11 where “[p]laintiff fails to identify the information that was taken” and “provides only conclusory
 12 allegations, claiming that Defendant was given access to confidential and proprietary information
 13 which was then disclosed to third-parties.”); *Pellerin*, 877 F. Supp. 2d at 989 (“[A]llegations that
 14 [plaintiff] had access to and acquired [defendant’s] trade secret information is insufficient to
 15 establish misappropriation.” (quotes omitted)).

16 Finally, Abhyanker’s trade secret allegations fail the “common sense” litmus test under
 17 *Twombly* and *Iqbal*. The crux of Abhyanker’s allegations against Benchmark relate to the June
 18 2007 meetings and subsequent disclosures of trade secrets in connection with his
 19 LegalForce/Nextdoor concepts. SAAC ¶¶ 117–26. But it makes no sense that Abhyanker would
 20 be pitching Fatdoor — a “public Wikipedia-like neighborhood commenting tool,” *id.* ¶ 117, to
 21 Benchmark, and at the same time, disclose purported trade secrets about a “separate and
 22 distinct,” *id.* ¶ 127, neighborhood social networking business LegalForce/Nextdoor. It makes no
 23 sense that Abhyanker would be pitching one business, but provide an entire “diligence file,” *id.* ¶
 24 122, about another business.

25 Abhyanker further provides no explanation for why trade secrets related to the
 26 LegalForce/Nextdoor concept (or concepts) would be relevant to Fatdoor, an entirely separate
 27 idea. Abhyanker only alleges that “an internal decision was made to work on an improved
 28 version of Fatdoor.com *centered on security and privacy*,” and “[t]o this end, [he] believed [a]

new version of Fatdoor.com could be accomplished by using some of Abhyanker's LegalForce and Nextdoor Trade Secrets." *Id.* ¶ 119 (emphasis added). But neither of the two trade secrets at issue here — the bidding history of nextdoor.com and location of the Lorelei neighborhood — has any apparent or alleged relationship with enhancing the security and privacy of a new version of Fatdoor. Fatdoor was already named, prototyped, and "developed into a working beta website," *id.* ¶ 119; thus, the bidding history of nextdoor.com or the initial testing of the website in the Lorelei neighborhood would be irrelevant.

Again, the only scenario that makes any sense is that Fatdoor and Nextdoor were one and the same — just as Abhyanker alleged previously in state court. *See* State Compl. ¶¶ 34–35.¹² As such, Abhyanker's trade secret misappropriation allegations fail to offer "sufficient facts to allow the Court to draw a reasonable inference that [Benchmark] is liable for the alleged misconduct." *Nexsales*, 2012 WL 216260, at *1.

V. CONCLUSION

Abhyanker has already filed and dismissed a meritless action against Benchmark, alleging the same events that underlie this action. Even construed in the light most favorable to Abhyanker, the allegations in the SAAC simply fail to add up. Abhyanker alleged two core trade secrets — the nextdoor.com domain name and source code — which are no longer at issue in this action. And the remaining trade secrets he has identified (bidding history and Lorelei neighborhood) cannot plausibly form the basis of his misappropriation claim against Benchmark. Nor has Abhyanker alleged any facts that Benchmark specifically misappropriated (*i.e.*, improperly acquired, used, or disclosed) those alleged secrets. Because Abhyanker has been given ample opportunity to amend his pleading — the SAAC is his *fifth* pleading — and any attempts to cure the defects would only mire him in further inconsistencies and contradictions, Abhyanker's counterclaim should be dismissed with prejudice. *Reddy*, 912 F.2d at 296–97 (upholding dismissal with prejudice where curative allegations would be inconsistent with his

¹² In fact, Abhyanker at one point appears to use Fatdoor and Nextdoor interchangeably in the SAAC. *See* SAAC ¶ 116 ("Before the formation of ***Fatdoor***, Abhyanker and Sood had discussed the possibility of Sood becoming a co-founder of ***Nextdoor***. However, when Fatdoor was formed, Sood was not selected to be part of ***Fatdoor's*** founding team." (emphasis added)).

1 prior pleading).

2
3 Dated: January 9, 2014

Respectfully submitted,

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